IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE JURISDICTION
FAMILY COURT APPEAL NO.95 OF 2002

Mr.Rajan Damodar Sapre,)
Indian Inhabitant, aged 41 years,)
Residing at Flat No.9, 7th Floor,)
Om Abhishek,)
Suvarna Sahakari Bank Lane,)
Bibwewadi, Pune 411 037.).. Appellant
(Org.Petitioner)

Vs.

Mrs.Sumidha Rajan Sapre,)
Indian Inhabitant, residing at)
C/o.Shri Atmaram S.Sardesai,)
Flat No.6, Ganesh Apts.,)
16, Tulshibagwale Colony,)
Sahakar Nagar No.2,)
Pune 411 009.).. Respondent
(Org.Respondent)

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Shri Rahul R.Nerlekar for the appellant.

None for the respondent, though served.

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CORAM : R.M.S.KHANDEPARKAR &

ANOOP V. MOHTA, JJ.

DATED : 10th JUNE, 2005.

ORAL JUDGMENT : (PER R.M.S.KHANDEPARKAR, J)

1. Heard the learned Advocate for the appellant.

None present for the respondent. Perused the records.

2. This appeal arises from the judgment of the Family Court, Pune, dated 23rd June, 2001 dismissing the petition for divorce which was filed by the appellant on the ground of desertion by the respondent.

3. The marriage between the appellant and the respondent took place on 2nd June, 1986 at Kolhapur. Sometimes in the year 1993, while they were residing at Kolhapur, the respondent fell ill. The medical treatment to her at Kolhapur did not give fruitful result till November, 1995. At the instance of the parents of the respondent, she was shifted to her parent's place and was admitted in a private hospital at Pune for the treatment. Thereafter, in 1996 the appellant, who was otherwise employed at Kolhapur, was also transferred to Thane. The divorce petition came to be filed by the appellant in June, 1998 and the same was dismissed by the impugned judgment after recording the evidence led by the parties.

4. It is the case of the appellant that the respondent proceeded to Pune in the month of November, 1995 for treatment without consent of the appellant. All efforts on the part of the appellant to bring her

back to stay with the appellant did not yield any fruitful result and on the contrary, the conduct of the respondent disclosed her determination not to return to the appellant, and therefore, he was compelled to file proceedings for dissolution of the marriage on the ground of desertion. On the other hand, the case of the respondent is that since the medical treatment at Kolhapur did not prove to be effective, she was compelled to go to Pune for the medical treatment and while at Pune, the appellant used to either visit her or used to inquire telephonically about her health condition. It is also her case that the plot at Kolhapur was purchased in her name and she had contributed towards the construction of the house therein, and for that purpose, she had raised loan from the bank at Kolhapur and has repaid the same from her salary and the taxes and other charges were also paid by her in respect of the said house. It is her further case that she has become handicapped and is dependent upon her parents and even she cannot walk without the help of a stick.

5. Placing reliance in the decisions of the Apex Court in **Sanat Kumar Agarwal v. Nandini Agarwal,** reported in (1990)1 SCC 475, **Adhyatma Bhattar Alwar v. Adhyatma Bhattar Sri Devi,** reported in (2002)1 SCC

308, **Niranjan Singh v. Gurdev Kaur,** reported in II(1983) D.M.C. 314 (Punjab and Haryana), **Neelam v. Vinod Kumar Midha,** reported in AIR 1986 P & H 253, **Anil Kumar Chopra v. Indiradevi,** reported in I(1986) DMC 448 (Madhya Pradesh), **Narinder Kumar v. Smt.Suresh Kumari,** reported in AIR 1988 Delhi 222, the learned Advocate for the appellant submitted that the intention to desert and leave the matrimonial house of the appellant without reasonable cause being apparent from the conduct of the respondent and clearly established from the evidence led by the parties on record, the Family Court erred in dismissing the petition for divorce. He has further submitted that there was never the case of the respondent either in the pleadings or in the evidence or in the reply to the appeal that she was willing to cohabit with the appellant and that itself apparently disclosed and established the desertion by the respondent without any reasonable cause. He has further submitted that even assuming that she had proceeded to Pune for medical treatment in the year 1995, the materials on record sufficiently disclosed that she had substantially recovered in the month of April, 1996, and therefore, since that time, she had no reason to continue to reside at Pune, away from the appellant. Besides, the evidence on record disclosed that there

were positive efforts on the part of the appellant himself and also through his maternal uncle to get the respondent back for co-habitation with the appellant but the same failed on account of the adamant attitude on the part of the respondent. The learned Advocate for the appellant, therefore, submitted the fact that the respondent stayed away from the appellant since 1995 without any cause clearly justifies the dissolution of the marriage on the ground of desertion, and therefore, the impugned order should be set aside and the decree of divorce should be granted in terms of the provisions of Section 13(1)((ia)(ib) of the Hindu Marriage Act, 1955.

6. Upon perusal of the records and hearing of the learned Advocate for the appellant, the point which arises for our consideration is whether the appellant has been able to establish that the respondent had deserted the appellant without reasonable cause and without his consent or against his wish and/or willfully neglected to cohabit with the appellant for a period of two years immediately preceding the date of presentation of the petition for divorce on the ground of desertion.

7. The testimonies of the appellant and other

witnesses including that of the respondent disclose that sometimes in November, 1995, the respondent proceeded to Pune for the purpose of medical treatment as the treatment at Kolhapur did not yield any fruitful result nor could cure her from the ailment. She was suffering from tuberculosis and meningitis. Though, in the pleadings, it was sought to be contended by the appellant that she was substantially cured by April, 1996, which fact was denied by the respondent, no efforts were made by the appellant to prove his contention in that regard. Not even a statement in respect thereof has been made before the Court in the course of examination of the witness in support of his case. On the contrary, though the pleadings were to the effect that the respondent was substantially cured in April, 1996, the testimony of the appellant was to the effect that during the illness of the respondent, she had started behaving in arrogant manner and was blaming the appellant for her illness and she had even threatened him with dire consequences and on account of such behaviour, he had stopped going to meet her since December, 1996. Though it was stated in the testimony that the maternal uncle of the appellant was sent to the house of the respondent to discuss about the matter, the maternal uncle was not examined as the witness. It is

true that the respondent has stated in her testimony that her parents had told her that the maternal uncle of the appellant had come to them for negotiations. However, what sort of negotiations were intended to, have neither been disclosed by the appellant nor any evidence in that regard has been produced on record. It has also come on record through the testimony of the respondent that before filing the petition, a letter was sent to her by the appellant. However, the contents of the said letter were neither disclosed nor established by the appellant. A suggestion was sought to be made to the respondent in the course of cross-examination that in the said letter, the appellant had asked the respondent to come back for cohabitation with the appellant, which suggestion was categorically denied by her, and yet no efforts were made to get such letter on record. It is pertinent to note that in the testimony of the appellant, he himself has nowhere stated that he had sent any such letter asking the respondent to come back for cohabitation with him. In fact, his testimony is totally silent on the point of any such letter being sent to the respondent. As regards the meeting of the maternal uncle of the appellant with the respondent, the testimony of the appellant discloses that the same was merely to inform the respondent to contact him on

a given telephone number.

8. The analysis of the evidence on record, therefore, nowhere discloses that when the respondent left for Pune, she intended either to desert the appellant or not to return to the appellant for cohabitation. On the contrary, she was constrained to proceed to Pune essentially to take medical treatment as the treatment at Kolhapur had failed to yield any fruitful result and the said fact has not been disputed or denied, and on the contrary, it has been clearly established not only by the testimony of the respondent but also from the testimony of the appellant himself.

9. There is absolutely no evidence on record to disclose that, at any time prior to the filing of the petition for divorce, the respondent was fully recovered from her ailment so that she could join the appellant for cohabitation with him. Added to this, the materials on record nowhere discloses any evidence on the part of the respondent to desert the appellant or to leave permanently her matrimonial house at Kolhapur. Her testimony which has remained unchallenged, discloses that she had contributed considerably towards the purchase of plot, as well as

the construction of the house thereon at Kolhapur. The loan amount of Rs.1,10,000/- was borrowed from the Bank of India, Shahupuri Branch, besides the loan of Rs.25,000/- from the Society was borrowed by the respondent and she had been repaying the said loan amounts along with the payment of house tax and other charges of the said house at Kolhapur since 1998.

10. It is pertinent to note that the testimony of the appellant discloses that since 1996, he took up a job at Thane, and since then he was in contact with the respondent at Pune from Thane. The testimony nowhere discloses that inspite of the fact that he had shifted to Thane on account of service, he continued to reside at Kolhapur or that he had intention to continue to reside in the matrimonial house at Kolhapur. There is nothing on record to disclose any effort on the part of the appellant to bring the respondent to Thane or even the efforts on the part of the appellant to have a place for cohabitation with her at Thane. In order to appreciate the grievance of the appellant that there is total failure on the part of the respondent even to make statement that she is ready and willing to cohabit with the appellant even today, it was primarily required for the appellant to discharge his burden regarding availability of the

place for cohabitation at Thane, and efforts on his part to get the respondent at such place and refusal for the same by the respondent. In the absence of any such material on record, onus did not shift upon the respondent to prove that she is even today ready and willing to cohabit with the appellant. The appellant having approached the Court for decree of divorce on the ground of desertion, necessary ingredients of the ground of desertion as contemplated under Section 13(1)(ib) of the said Act read with the explanation thereunder, were required to be established, primarily by the appellant, and only thereafter, the onus would have been shifted upon the respondent. The appellant himself having failed to discharge the burden, no amount of weakness in the defence of the respondent can enure to the benefit of the appellant. It is true that there cannot be always direct evidence of the factum of desertion. Nevertheless, some cogent materials in order to enable the Court to arrive at an appropriate finding on the point of desertion, based on the inference to be drawn which can follow from such materials, must be established by a person approaching the Court for decree of divorce on the ground of desertion. In the case in hand, the materials on record rather than pointing out desertion by the wife, disclose total inaction on the part of

the husband for cohabitation with the wife. Once the appellant himself admits that he had shifted his residence to Thane without disclosing the said fact to the respondent, in the absence of the availability of the place for their cohabitation at Thane or nearabout, how could the appellant expect the respondent to come out with a statement about her readiness and willingness to cohabit with the appellant ? It is also pertinent to note that it was not the case of the appellant before the Family Court that there was refusal on the part of the respondent to cohabit with the appellant. The contention related to mere absence of reference from the respondent. The statement in the pleadings on the aspect of cohabitation reads thus:-

> "Since April 1996 when the Respondent was cured to a major extent of her disease the Petitioner requested her to cohabit with him, Not only that, Petitioner tried to take her to his place through his near relatives, But the Respondent was adamant and she was not responding at all."

The pleadings have been clearly denied by the respondent stating that :-

> "The contents of para (6) of the petition are not true or correct and hence denied by the Opponent. It is denied that the Respondent was cured to a major extent. It is also denied that the Respondent has denied to cohabit with the Petitioner."

Once the respondent had denied the allegation that she had refused to cohabit with the appellant, it was not necessary to make further positive statement to the effect that she was ready and willing to cohabit with the appellant. Indeed, the appellant failed to discharge his burden to establish that the respondent had deserted him for a period of more than two years prior to the date of filing of the petition.

11. The decision of the Apex Court in **Sanat Kumar Agarwal's case (supra)** is to the effect that the question of desertion is a matter of inference to be drawn from the facts and circumstances of each case and those facts have to be viewed as to the purpose which is revealed by those facts or by conduct and expression of intention, both anterior and subsequent to the actual act of separation. As already observed above, the facts in the case in hand, either prior to

April 1996 or even thereafter, nowhere establish the conduct on the part of the respondent which could reveal that she had no intention to cohabit with the appellant. Besides, as already observed above, the respondent had categorically denied the allegation about refusal to cohabit with the appellant.

12. The decision of the Apex Court in **Adhyatma Bhattar Alwar's case (supra)** was based on the facts of the case wherein the parties were married on 22nd August, 1978 and for the purpose of delivery of a child, the wife had proceeded to her parent's place and gave birth to a daughter on 12th December, 1979, however, thereafter she continued to stay with her parents. The husband as well as his relatives tried several times to persuade her to return to the matrimonial home. The wife expressed her wish that husband should find accommodation, separate from that of his parents, otherwise she would not return to him. When the husband went to bring his wife on 23rd May, 1981, she told her husband that she would join him only after he got a job. In the background of those facts, the petition for divorce came to be filed as late as on 21st February, 1984, and the wife had not returned to husband nor did she express her intention to return and join her husband. In those facts, the

Apex Court observed that while contesting the petition the wife pleaded that she could not live in the house of her husband's parents, because her father-in-law had repeatedly made indecent advances towards her and had tried to molest her and that he had also beaten her when she protested, and to that the husband was a silent spectator. However, she was not able to establish any of such allegations in the course of trial. Considering the same, it was held that the ingredients of desertion contemplated under Section 13(1)(i-b) of the Hindu Marriage Act, 1955 were established. That is not the case in the matter in hand, and therefore, the ruling has no application to the facts of the present case.

13. In **Niranjan Singh's case (supra)**, the Division Bench of Punjab and Haryana High Court, had held that the wife describing herself as a widow during life time of husband must be taken to have established animus deserendi on the part of the wife. The decision is clearly distinguishable, and therefore, is not attracted in the case in hand.

14. In **Neelam's case (supra)**, the wife after leaving matrimonial house had initiated the proceedings for return of dowry which clearly

disclosed intention to put an end to the marital relationship, and therefore, that was a case of desertion within the meaning of the said expression under the provisions of the said Act.

15. In **Anil Kumar Chopra's case (supra)**, a clear finding was on the analysis of the evidence to the effect that the wife was voluntarily living away from the husband and there was a clear assertion on her part that she did not want to join her husband which clearly depicted her intention to desert her husband. That is not the case in hand, and therefore, the said ruling also has no application to the case in hand.

16. In **Narinder Kumar's case (supra),** the parties were living separately for about 8 years accompanied by the persistent filing of criminal complaints by the wife against the father and mother of husband which was held to be sufficient to establish the factum of desertion.

17. The decisions relied upon, therefore, being clearly distinguishable on facts, have no application to the matter in hand.

18. For the reasons stated above, therefore, we do

not find any justification for interference in the impugned judgment dismissing the petition for divorce on the ground of desertion on account of failure on the part of the appellant to establish the said ground for dissolution of marriage. Hence, the appeal fails and is hereby dismissed with no order as to costs.

(R.M.S.Khandeparkar, J)

(Anoop V.Mohta, J)